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Supreme Court of the United States

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER

Petitioner

against

UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

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vs.

THE UNITED STATES OF AMERICA

BRIEF FOR PETITIONER

I.

Opinion of the Court Below

The opinion of the Court of Appeals, Second Circuit, was reported in 113 Fed. (2d) 97. It appears in R. 399-403.

II.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 28, 1940 (R. 404). The petition for Certiorari was filed July 29, 1940 and granted October 14, 1940 (R. 405).

The jurisdiction of this Court is conferred by Judicial Code, Sec. 240 (a) (28 U. S. C., Sec. 347) as amended by the Act of February 13, 1925, 43 Stat. 938.

III.

Statement

Earl Russell Browder, the petitioner, is a native citizen of the United States, born in Wichita, Kansas. He appeals from a judgment convicting him of violating §2 of Title IX of the Act of June 15, 1917, U. S. C. Title 22, §220.[1]

The conviction was for "*using* a passport secured by reason of a false statement".

The false statement counted on was that in reply to a question in a passport application "my *last* passport was obtained from", petitioner wrote in "None". The government adduced evidence that the statement "None" was inaccurate,—that petitioner had in 1921, 1927, and 1931, obtained passports in other names: Dozenberg, Morris, Richards.

On August 31, 1934, petitioner applied for a passport in his own name. It was that application that contained the statement "None" (R. 305). Upon that application a passport was issued on September 1, 1934. It expired on September 1, 1936.

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[1]Sec. 2 reads as follows:

> "Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whover shall willfully and knowingly use or attempt to use or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years or both."

The indictment was under the second clause of §2.

Section 2 is one of four sections of Title IX of the Espionage Act of June 15, 1917. Title IX is printed in full at the end of the brief *infra* pp. 31-3. The history and background of the statute is discussed *infra* pp. 7-9.

Five months after its expiration, petitioner applied for a renewal of the 1934 passport. The renewal application contained no misstatement. No representation as to other passports was called for or made. The non-Browder passports had all expired. The representation "None" was not repeated. The *last* passport, that of September 1, 1934, was presented for renewal and on the day of its presentation, February 2, 1937, it was stamped "renewed to September 1, 1938".

The passport on the use of which the indictment rests, charged to have been secured by a false statement, is the 1934 passport, after its expiration and renewal. Petitioner was not indicted for making a false application for a passport.[2] (If the representation "None" would have sustained such a charge, the prosecution for that offense would have been outlawed in 1937, two years before this indictment was filed.) The indictment charges and the conviction rests upon the "willful and knowing *use*" of a passport alleged to have been fraudulently secured.

The "use" charged to have been "knowing and willful" was the use of the 1934 passport after its expiration and renewal. The indictment charges the use on two occasions, each made the subject of a separate count: on April 30, 1937 and again on February 15, 1938, petitioner handed to the immigration inspectors in the port of New York the passport which correctly described his native birth. Petitioner needed no passport to enter the United States. A birth certificate, baptism certificate, an expired passport, or other satisfactory proof might have been exhibited to establish that he had been born in Kansas.

The statute under which petitioner was convicted was recommended for passage in 1916, before this country entered the World War. It was designed to stop the use of American passports in violation of our neutrality. The

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[2]The first clause of §2 quoted *supra* makes provision for such a prosecution.

message transmitting the statute to Congress called for punishment "for the person who *fraudulently obtains* or *fraudulently uses* a passport". The trial court charged that the words "willful and knowing" mean "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent" (R. 292-3).

For the two "uses" as so defined, petitioner was convicted of felony and sentenced to four years in prison,—two years, to run consecutively, for each use,—and was fined $2,000.

IV.

SUMMARY OF ARGUMENT

First Point

The indictment does not charge the commission of an act that the statute made criminal.

Petitioner is not and could not have been indicted for fraudulently obtaining a passport, for if the representation "None" were false and material, the offense had been barred by the Statute of Limitations for more than two years prior to the filing of the indictment. By indicting petitioner for what was an innocent *use* of the passport, the government in effect got around the Statute of Limitations, but it was compelled to distort the term "willful and knowing use" beyond the spirit and purview of the passport act.

The act aimed to prohibit passport uses which were dishonest in themselves—uses fraudulently invoking the protection or safe-conduct of the United States in foreign relations. Such uses it denominated willful.

Petitioner was not charged with anything dishonest or evil. The passport was issued to him in his name and correctly described his native birth. He was not, in

presenting it to the immigration inspectors in New York, invoking the privilege of the safe-conduct of the United States. He was exercising his absolute right as a citizen to enter his native country. No passport was necessary for this purpose,—only some documentary or other evidence to establish that he was not an alien.

The position taken by the Solicitor General in opposing certiorari—that it is not necessary to show an evil intent to establish a willful use—is irreconcilable with the history and background of the legislation and is directly opposed to the position taken by the Attorney General who sought the legislation and by a United States Attorney charged with its enforcement.

Second Point

A verdict should have been directed for petitioner since there was no evidence of a wilful use of a passport,—no showing of any evil use. The document was used by petitioner to certify truthfully to the fact of his American birth.

The absence of evidence of bad faith in the use of the 1934 renewal passport led the United States Attorney to focus the attention of the jury unfairly and confusingly upon the use or acquisition of earlier passports,—passports issued to the petitioner not in his own name as was the 1934 passport, but in other names.

The court erroneously charged willfulness out of the case; he instructed the jury that a deliberate or intentional use of the document constituted a willful and knowing use.

ARGUMENT

FIRST POINT

The "use" for which petitioner was convicted was not the kind condemned by the statute. It was not a passport use. It did not invoke the protection of the United States abroad. It was not willful, fraudulent, or otherwise evil.

The "use" for which petitioner has been indicted is the presentation of a passport as truthful proof of his Kansan birth (R. 347). He was not using the passport to invoke the protection or safe-conduct of the United States abroad. He was exercising his right as a citizen to enter his country. No passport was necessary. The demonstration that he was not an alien could have been made through the use of a birth certificate, a baptism certificate, an expired passport,—any satisfactory proof. This innocent use has now been adjudicated criminal on the ground that the document that he presented was tainted,—the passport had been acquired by the representation "None". The representation, it will be observed, had nothing whatever to do with the correctness of the statement in petitioner's application that he was an American citizen.

If the representation "None" was false and material petitioner might have been indicted under §1 of Title IX for perjury or under the first clause of §2 of that Title for the fraudulent obtaining of a passport. The time to bring such indictments expired in 1937, over two years before this indictment was filed. The government has in effect circumvented the Statute of Limitations by convicting petitioner for the *use* of the passport.

Title IX, the chapter of the Espionage Act relating to passports[3], in prohibiting "willful" uses of passports aimed to prevent *dishonest* uses of the *safe-conduct* of the United States in *foreign relations*. The exigencies of the

[3]Printed in full *infra* pp. 31-33.

case require the government to extend "willful" use of passports to include something not dishonest, not connected with the safe-conduct of the United States, and having nothing to do with foreign relations.

It is submitted that there is no warrant for the legalistic construction of the term "willful use" by which the government seeks to justify the conviction of petitioner.

1. The mischief that the statute was designed to prevent was passport frauds,—the misuse of passports largely by Germans or German sympathizers to get back to the Central countries.

By 1915 notorious passport frauds were bringing our passports into disrepute.[4] As early as January 20, 1915, Secretary Bryan, in answer to a letter of Chairman Stone of the Senate Committee on Foreign Relations, explained why American "citizenship papers and passports" were being disregarded. There were authentic cases, he said, "in which American passports have been fraudulently obtained and used by certain German subjects". He found indications of "a systematic plan" to obtain American passports through fraud for the purpose of securing safe passage for German officers and reservists desiring to return to Germany. "Such fraudulent use of passports" he added, "by Germans themselves, could have no other effect than to cast suspicions upon American passports in general".[5]

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[4]On the arraignment of one Carl Ruroede on January 3, 1915 for supplying German reservists with passports, the prosecution contended "that the use of false passports has three bad effects. It discredits the United States Government in the eyes of foreign countries; it makes foreign officials less regardful of the lives of genuine American citizens and it turns loose American passports which could be used again and again in countries where the exact regulations are unknown and lead to incidents such as that of the spy Lody" (N. Y. Times, Jan. 4, 1915. Carl Hans Lody, a German, executed in London as a spy, carried an American passport.)

[5]This language is later quoted in a letter from the State Department to Representative John J. Fitzgerald, dated August 18, 1916 (Appendix, pp. 43-44).

In reviewing the situation in later years, Secretary Lansing wrote of "the *improper use* of passports issued by the United States and by other neutral countries to secure the *safe passage* of Germans through the enemy's line of blockade to ports in neutral territory and adjacent to Germany which was their ultimate destination" (War Memoirs of Robert Lansing [1935] p. 73, italics ours).

2. The Government asked Congress for legislation to punish "the person who fraudulently obtains or fraudulently uses a passport".

In May, 1916, Attorney General Gregory, mindful of these evils, submitted certain recommendations to Congress. These recommendations were concurred in by the Secretary of State and by the joint State and Navy Neutrality Board (Appendix pp. 11-13). The Attorney General recommended the passage of "Legislation Amending the Criminal and Other Laws of the United States *With Reference to Neutrality and Foreign Relations*". For this purpose he submitted eighteen bills with separate recommendations explaining each bill.

Recommendation V[6] referred to the passport bill. This recommendation called for legislation requiring applications for passports to be under oath and making false statements in such applications perjury. It sought to make criminal the fraudulent obtaining, transfer or use of passports and the alteration or forging of passports.

There should, said the Attorney General, "be punishment for the person who *fraudulently obtains* or *fraudulently uses* a passport."

The passport bill which the Attorney General submitted to carry out this recommendation was entitled "To regulate and safeguard the issuance of passports, and to pre-

[6]Printed in full in Appendix pp. 11-12.

vent and punish the fraudulent obtaining, transfer, use, alteration, or forgery thereof".

The various bills which the Attorney General submitted "relating to foreign relations and neutral obligations of the United States were combined" and to them "was added an espionage measure". "This combined statute was popularly given the title of the 'Espionage act' although the espionage feature was not in reality the most important portion of the bill".[7]

3. Title IX as passed embodied the recommendations of the Attorney General. The uses it prohibits are fraudulent uses. The term used to describe those uses is "willful and knowing".

The terms of the statute were substantially identical with those in the bill that was drafted and presented by the Attorney General.[8]

The *fraudulent uses* of passports are covered by §2 (second clause), §3 and §4.[9] Each bans the dishonest use of a passport: §2 of a passport dishonestly obtained through means of a false representation; §3 of a passport intended for another or in willful violation of restrictions; §4 of a

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[7]1917 Report of Attorney General (Appendix p. 18).

Besides passports the Espionage Act covers such subject-matters as the injury and destruction of goods and plants, vessels and cargoes; conspiracies to destroy properties in foreign countries; false impersonation of foreign representatives; false swearing to influence agents of foreign countries; provisions for the detention of vessels to prevent violations of neutrality; control over radio; and similar matters (Public No. 24, 65th Cong., 1st Sess.).

[8]The changes are indicated in the Appendix pp. 6-9.

[9]The fraudulent obtaining of passports is covered by §1 and the first clause of §2 of Title IX. The Attorney General had doubts whether an oath required merely by a regulation was sufficient foundation for a perjury charge. (Appendix p. 11.) Accordingly, §1 required applications to be under oath which automatically made them perjury. §2 makes criminal the willful and knowing making of a false statement in an application with intent to induce the issuance of a passport.

forged passport or of one which had ceased to be usable as a passport.

Section 2 (second clause) §3 (first and third clauses) §4, made criminal the dishonest use of dishonestly procured passports. Such uses were rife at the time, for German agents were using passports issued in American names on fraudulent identification[10]; or they were using American passports which had been purchased or stolen[11] or they were using passports which had been forged[12].

The use clauses had a common factor. They were all addressed to dishonest uses and all except one to dishonest uses of passports dishonestly procured. They were uses in themselves evil,—the use of a passport to invoke fraudulently the protection of the United States abroad.

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[10]The German spy Stegler (Stoegler) obtained a passport by impersonating an American named Madden (Appendix pp. 17, 48, N. Y. Times, Feb. 25, 1915, p. 1, col. 3; March 17, 1915, p. 4, col. 2. Franz von Rintelin was indicted for applying for a passport in the name of Gates. (Appendix p. 15, N. Y. Times, Oct. 19, 1915, p. 2, col. 6.) Von der Goltz, said to have been a confessed German spy, had a passport under the name of Bridgman Taylor (N. Y. Times, March 29, 1916, p. 1, col. 13; April 7, 1916, p. 20, col. 2). Harry Max Zelinka pled guilty to an indictment charging him with having aided Bondy, a German, to procure a fraudulent American passport under the name of Harold Green. (Appendix p. 15, N. Y. Times, Jan. 28, 1916, p. 4, col. 7.)

[11]The passport of Berko, an American citizen, had been stolen by Stephen Cziszar, an attaché of the Austro-Hungarian Consulate in New York City (Appendix p. 49). Carl Ruroede was arrested for furnishing passports to four young German reservists. (Appendix p. 9, cf. pp. 46, 47-48, N. Y. Times, Jan. 3, 1915, p. 1, col. 3; and March 9, 1915, p. 4, col. 1.)

[12]Capt. Von Papen was in charge of an office in the German Embassy in New York where passports were "forged by wholesale". (Committee on Public Information, Appendix p. 45. Statement of Attorney General in his recommendations to Congress, Appendix p. 12).

Capt. Von Papen had paid money to Carl Ruroede, the dealer in fraudulent passports (War Memoirs of Robert Lansing p. 79). Capt. Boy-Ed was implicated with Von Papen in the passport frauds (id. p. 74) and it was because of Boy-Ed's connection with the passport frauds that his recall from the United States was requested (id. p. 80).

The words employed to describe these prohibited "fraudulent" or "unneutral"[13] uses were "willful and knowing".

The Judiciary Committee of the House in reporting the Bill made it clear that they had striven to "avoid making innocent acts criminal" (Appendix p. 25). The Committee was referring to Title I of the Act, the title relating to Espionage, but there is no doubt that the word willfully was used to make certain that only criminal acts would be punished[14].

At the time of the passage of Title IX there was no doubt that the words "willful and knowing" meant evil or dishonest uses. *Felton* v. *United States,* 96 U. S. 699, 702, 703; *St. Louis and San Francisco Railroad Co.* v. *United States,* 169 Fed. 69, 71 (C. C. A. 8).[15]

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[13]"There are many cases from which the following are a selection, in which American passports were fraudulently procured and used for unneutral purposes". The report then mentions some of the cases referred to *supra.* (United States Committee on Public Information: German plots and intrigues in the United States during the period of our neutrality. Appendix p. 48.)

[14]For example; the committee says in referring to §5 of Title I—"Section 5 of Title I makes it a crime for any person to willfully convey false reports or statements with the intent to interfere with the operation or success of the military and naval forces of the United States, or to promote the success of the enemy, and for anyone in time of war to willfully cause, or attempt to cause, insubordination, disloyalty, or refusal of duty in the military or naval forces. The committee feel that no patriotic American will ever attempt willfully to violate the provisions of this section" (Appendix p. 26).

[15]"Doing or omitting to do a thing knowingly and willfully implies no want of knowledge of the thing but a determination with a bad intent to do it or to omit doing it", said Mr. Justice Field writing for a unanimous court in 1877, reversing a conviction. "'Willfully means something not expressed by a knowingly' else both would not be used conjunctively", stated Van Devanter, J., in 1909, writing for the unanimous 8th Circuit, reversing a conviction. (*St. Louis and San Francisco Railroad Co.* v. *United States,* 169 Fed. 69, 71.)

There is no doubt today (*United States* v. *Murdock*, 290 U. S. 389)[16].

The Solicitor General now argues that a "willful and knowing" use may mean one "not involving moral turpitude" and having no implication of evil purpose[17].

This argument, though necessary to support the conviction, might be dismissed as refuted by the history and the purposes of Title IX. We go further however, and show that the precise contention was rejected by other officials in the Department of Justice in construing the same clause of the same section of the same title.

In 1940,—when this very §2 of Title IX came up for interpretation—the United States Attorney for the Southern District of New York, in *United States* v. *Warszower*, 113 Fed. (2d) 100,[18] insisted that the statutory phrase "willful use" meant an evil use.

The indictment there charged that Warszower was not a citizen, that he had obtained a passport by a fraudulent misrepresentation, and that he had used this passport for the purpose of securing entry into the United States. The United States Attorney sought to distinguish cases like *Stromberg* v. *California*, 283 U. S. 359, *DeJonge* v. *Oregon*, 299 U. S. 353, *Lanzetta* v. *New Jersery*, 306 U. S. 451, cited by the appellant as holding that the term "use

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[16]The opinion of the court construing "willfully" says, p. 394, "the word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose" citing the *Felton* and other cases.

The court in the *Murdock* case in arriving at the meaning of the word "willfully" called to its aid the other offenses "which the statute denounces in the same sentence only if willful" "in ascertaining the meaning" of the offense there charged, p. 395.

[17]Brief in opposition to Certiorari, pp. 13-14.

[18]The *Warszower* case was decided in the Circuit Court of Appeals about the same time as the *Browder* case. Certiorari was granted in both cases on the same day. The *Warszower* case is #338 on the calendar of this court.

was so indefinite as to suggest its unconstitutionality".[19] He said:

> "* * * in none of the three cases cited was a specific criminal intent required for violation of the statutes held invalid. The statute in the instant case [a conviction under Section 2], and its cognate sections, punish only one who 'willfully and knowingly' uses a passport contrary to the terms of the statute. The words 'willfully and knowingly' import that the prohibited use of the passport be with bad faith and evil intent. *United States* v. *Murdock*, 290 U. S. 389 (1933). An illegal use of a passport by one innocently supposing that such use was proper would not support a conviction under either Section 220 or 221 or 222 of Title 22 [Sections 2, 3 and 4 of Title IX]. The hazards of criminal prosecution do not attend innocent mistake. The *criminal intent* required by the instant statute distinguishes it from the statutes in the cases cited by appellant." (Government's Brief before the Circuit Court of Appeals, p. 24; italics ours.)[20]

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[19]This contention was made (R. 232-3) and preserved in this case (R. 233, 236, 386-7).

[20]The United States Attorney undoubtedly had in mind the following principles of statutory construction: A statute so vague and uncertain as to make criminal an act innocently done without any evil purpose would arbitrarily restrict constitutional guarantees. *Herndon* v. *Lowry*, 301 U. S. 242, 258-259. "An act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril". *Chippewa Indians* v. *U. S.*, 301 U. S. 358, 376. "A clear requirement of an unlawful intent may save a statute which defines the acts required for liability in an indefinite manner". Livingston Hall, *The Substantive Law of Crimes*, 50 Harv. L. R. 616, 638. *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 502-503; *Am. Telephone and Telegraph Co.* v. *U. S.*, 299 U. S. 232, 245.

4. The willful and knowing use that was made criminal was a passport use, one that misused the safe-conduct of the United States in foreign relations.

The evils at which the Act aimed were violations of our neutrality; the fraudulent attempts "to secure safe passage for German officers and reservists desiring to return to Germany" (supra p. 7); "improper use * * * to secure safe passage of Germans through the "British blockade" (supra p. 8).

The controls of Title IX were aimed at international relations. Attorney General Gregory, in his reports, apprised Congress of the "inadequacy of our criminal laws relative to neutrality and foreign relations, and the necessity for their complete revision * * *" (Appendix p. 14). And the recommendations that he submitted were recommendations amending the criminal and other laws of the United States "with reference to neutrality and foreign relations" (Appendix p. 10).

In transmitting the recommendations the Attorney General informed Congress that he had consulted the State Department and the State and Navy Neutrality Board, who he said, concurred in the recommendations (Appendix pp. 11, 13). There is no suggestion that he consulted the Department of Labor which then had jurisdiction over entry into the United States,—the department whose inspectors decided whether persons entering were American citizens or aliens.

Congress could not have contemplated that it was making criminal the use of passports to facilitate entry into this country, for in 1917, when the Act was passed there was no requirement that a citizen entering the United States have a passport. On the contrary, on January 24, 1917, President Wilson in laying down rules covering the granting and issuance of passports, said "Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries, *and not to facilitate entry into*

the United States, immigration being under the supervision of the Department of Labor[21].

What John Bassett Moore (3 Digest of International Law 58) had written in 1906 remained true in 1917, and as to citizens in 1937 and 1938: "there is neither law nor regulations in the United States requiring those who resort to these territories to produce passports".

Though a passport may incidentally identify the holder, its essence is that it extends to the holder the protection of the United States abroad. That is what the passport says: "I, the undersigned Secretary of State of the United States of America, hereby request all whom it may concern to permit safely and freely to pass and in case of need to give all lawful aid and protection to Earl Russell Browder a citizen of the United States"[22] (R. 315). The protection of the United States is a privilege which may be withheld in the discretion of the Department of State.[23] And the "protection of the United States" once granted "may be withdrawn" if the person uses a passport in violation of its conditions or restrictions.[24]

With this interpretation of the passport, the authorities are in accord. "The issuing of passports is a convenient system adopted by States to secure for their citizens a right of transit through *foreign* countries" (Borchard, *Diplomatic Protection of Citizens Abroad*, N. Y. [1916], p. 493, our ital.). A passport "is a document, which, from its nature and object, is addressed to *foreign* powers"

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[21]This provision is likewise contained in the Presidential passport rules of:

June 7, 1911, rule 4, par. 3; Nov. 13, 1914, rule 4, par. 3; Jan. 12, 1915, rule 5, par. 3; Dec. 17, 1915, rule 6, par. 2; Apr. 17, 1916, rule 6, par. 2.

[22]The United States Attorney, in his summation refers to the passport as "one of the most solemn and sacred documents that it lies in the possession of our country to give; it is safe-conduct to one of its citizens".

[23]*Miller* v. *Sinjen*, 289 Fed. 388, 394.

[24]Rules issued by President Roosevelt March 31, 1938 (Appendix p. 21).

(*Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699, our ital.). A passport "certifies that the person therein described is a citizen of the United States and requests for him while *abroad* permission to come and go as well as lawful aid and protection" (Borchard, *supra*, our ital.). A passport "is intended *only* for use *abroad*, and has no sanctioned uses, customary or statutory, within the United States[25] in time of peace" (Dept. of State, *The American Passport* [Gaillard Hunt, ed., 1898], p. 4, our ital.).

Besides granting the privilege of the protection of the United States, the passport may also serve as evidence of the holder's citizenship. But a passport need not be valid as a passport to serve as such a means of identification. An expired passport, for example—whose *willful* use for *passport* purposes would be criminal under Sections 3 and 4 of Title IX—may serve for this purpose. A recent instance is described in the New York Times of July 19, 1940. It told how Americans who had lived abroad for years, and who were fleeing the war zones of Europe, identified themselves as American citizens by presenting "faded and outdated passports,—some as old as twenty and thirty years" "at the immigration tables" in the Port of New York.

Similarly, an old passport may be used for identification in applying for a new passport. Once it was decreed that only a non-expired passport would serve for this purpose, but in 1901 the regulation was revoked and the new regulations provided that an old passport could be used for this purpose without regard to the time or place of its issuance.[26]

For the purpose of identification, a passport valid or expired is on no higher plane than a birth certificate, a

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[25] The court below objected to Mr. Hunt's use of the phrase "within the United States", pointing out that a common use of a passport is the presentation in the United States to obtain a visa (113 Fed. [2] 99). But the objection does not affect the principle for the purpose of the visa is to make the passport efficient as a safe-conduct abroad,—it is necessary to have passports visaed for entry into certain countries.

[26] 3 Moore's Digest of International Law 913-4; Compilation, p. 3.

baptism certificate or anything that will satisfy the immigration inspector that the person entering the country is not an alien (R. 122, 128).[27] Many activities in the United States can be undertaken only by citizens. The various departments in charge may require proof of citizenship. Some may accept passports as such proof. It is a far cry from the purposes of Title IX to assume that the use of a passport to prove one's citizenship to obtain a license to fish or hunt in the Nunivak Island Reservation or to assert a claim to public lands or to obtain a pilot's license is within Title IX.[28] But hardly more so than the conten-

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[27]And so Americans travelling abroad were notified by the State Department—"Each native American citizen leaving the United States without a passport is advised to have in his possession a birth or baptismal certificate or a sworn statement from a reputable American citizen certifying to the place and date of his birth while each naturalized citizen should carry his certificate of naturalization. This evidence is often necessary to obtain return passage (to the United States), and is useful to insure speedy reentry into the United States". (Notice Concerning the Use of Passports—the parenthesis is in the original text; series 1921-1925.)

In the notice to bearers of passports current in 1937 and 1938, the State Department though advising Americans to carry passports, said, for the benefit of those who travel without them "American citizens who leave the United States without passports, should carry with them proof of their citizenship, such as birth, baptism or naturalization certificates". (Notice to Bearers of Passports.)

[28]The extremes to which the government's contentions might lead—the possibilities of using innocent acts to revive offenses long barred by the Statute of Limitations, may be illustrated by a hypothetical case. A person is indicted under a *traffic law* so drawn as to make criminal the willful use of an automobile license procured by a misrepresentation. The history of the traffic law shows an intent to prevent operation of automobiles by an unauthorized person. The license holder uses the automobile license certificate to prove his residence in order to obtain a trapper's license. The Conservation Law of the state (like §180 [3] of the Conservation Law of New York) makes an automobile license proof of residence for this purpose. The license holder is indicted because years before he had obtained an earlier license upon an application correctly reciting his residence but withholding certain facts about a prior conviction for speeding. At the time of the indictment the Statute of Limitations barred prosecution for the concealment of the conviction for speeding.

tion made here, for petitioner was not exhibiting his passport invoking a privilege—not the privilege of the protection of the United States abroad, or of a license to fish or any other kind of a license. He was asserting a right.

When petitioner returned to the United States in 1937 and 1938 he needed no passport. None was needed in 1917 when the Act was passed. From that time to this except for the war period (1918-1921)[29] no passport was needed for returning Americans. All that was required was that petitioner on his return satisfy the immigration service by any kind of suitable evidence that he was not an alien.

5. The term "use" prohibits employment of a fraudulent and deceptive passport in connection with safe conduct abroad; its meaning may not, in a criminal statute, be stretched to include an act that had no connection with safe conduct abroad and deceived no one.

Since §§2, 3 and 4 of Title IX ban *dishonest passport* uses and since all misuses are made felonies punished by the same severe penalties, the principles of statutory construction exclude the extension of the term to cover *innocent, non-passport* uses. "There is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning"[30] unless some

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[29] In 1918 Congress passed an act establishing war time control of the entry of citizens and aliens. This act required from citizens and aliens alike the possession of a passport as a condition to entering the United States. The act of 1918 was a war statute. With the end of the war it lapsed as to citizens. The State Department sought to have the act continued as to citizens as well as to aliens (Appendix p. 39). It was continued as to aliens by act of March 2, 1921, 22 U. S. C., §227, Appendix p. 41. But Congress deliberately refused to continue it as to citizens (Appendix pp. 39, 40, 41).

[30] *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, 433.

In the *Murdock* case the Supreme Court (290 U. S. 389, 395) and in the *Warszower* case, the United States Attorney, *supra* p. 13 resorts to the cognate sections of the statute to construe the term "willfully". Here not only the cognate sections, but—the history of the legislation shows—the very language on which the indictment rests (the second clause of §2) employs the term "willful" to ban uses that are fraudulent or deceptive.

controlling purpose indicated by the history of the statute requires that they be given a different meaning. Here, as we have seen, the history of the act shows that the term "willful use" meant throughout the act a fraudulent or deceptive use.

And this would be the construction even if at the time the act was passed it had been the practice of returning Americans to identify themselves in the home port by exhibiting their passports. For criminal statutes are not broadened to embrace acts not within their scope and purview. There are no such things as constructive crimes.[31]

And this would be true had the act complained of actually been evil, but the kind of evil which though within the letter was not within the spirit and intendment of the statute. *United States* v. *Cohn*, 270 U. S. 339, 345; *Fasulo* v. *United States*, 272 U. S. 620, 629; *United States* v. *Katz*, 271 U. S. 354-357; *McBoyle* v. *United States*, 283 U. S. 25, 27; *United States* v. *Adielizzio*, 77 Fed. (2) 841, 843[32]; *United States* v. *Fruitgrowers Express*, 279 U. S. 363, 370; *Prussian* v. *United States*, 282 U. S. 675, 677. Literal construction is not carried so far, *Apex*

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[31] *Fasulo* v. *United States*, 272 U. S. 620, 629.

[32] Adielizzio had been convicted of conspiring to aid persons to procure by fraud, seamen's protection certificates. These certificates are issued by the Collector of Customs. They certify to the citizenship of seamen. The section describing them (46 U. S. C., §686) refers to them in the caption as certificates of citizenship.

The Statute under which Adielizzio was convicted (18 U. S. C. 139) has four clauses; two relate to the fraudulent procurement or possession of "certificates of citizenship" without qualifying them; the other two contain references limiting them to certificates connected with naturalization proceedings.

The court reversed the conviction holding that since the history of the Penal Statute showed that it was intended to prevent naturalization frauds the term "certificate of citizenship" must be limited accordingly.

Hosiery Company v. *Leader*, 310 U. S. 469, 489; *United States* v. *American Trucking Ass'n*, 310 U. S. 534, 542-4.[33]

A fortiori, the Statute is not to be extended to different concepts not in the minds of the legislators at the time Title IX was passed. The court below avoided this obstacle by stating that from 1930 on, the use of the passport for identification had become "a sanctioned use" (R. 402). The question is not whether the use had become a sanctioned use in 1937 and 1938. The use of a passport to identify one as a citizen to enable him to procure a trapper's license might be sanctioned too. The use of an expired passport regardless of its age, for purposes of identification, has for years been sanctioned when one is applying for a new passport.[34]

The question then is not whether the use had become a sanctioned use. The question is whether the use was the kind of thing that Congress intended to make criminal. The court below said that a statute "is prospective and its application to a given state of facts may change as new things or new uses of old things come into existence" and for that principle, the court cited "*DeLima* v. *Bidwell*, 182 U. S. 1; 21 S. Ct. 743, 45 L. Ed. 1041; *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 58 S. Ct. 167, 82 L. Ed. 235; *Maxwell on Interpretation of Statutes*, 6th Ed., pp. 144-145."

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[33] *Securities Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U. S. 434, 445, was a civil Bankruptcy case. Literal interpretation of Chapter XI of the Bankruptcy Act would have permitted a corporation with securities publicly held to file under Chapter XI. The Solicitor General there correctly stating the principle of statutory interpretation, said "Although literal construction of the definition provisions of the Act would permit a publicly held corporation to file under Chapter XI, the structure of the Act as a whole, as well as its legislative history, shows unmistakably that such literal construction does not reflect the meaning of Congress. The rule is firmly established that the real purpose and intent of the legislative body must prevail over the literal import of the words used" (310 U. S., at p. 437).

[34] If the expired passport were *willfully* used for the passport purposes, this would be an offense within the provision of §§3 and 4 of Title IX.

Within limits this is true. A Statute punishing the committing of a crime with the use of a deadly weapon probably includes one committed with a weapon that was not known at the time the Statute was passed, but the principle does not apply and has never applied so as to comprehend matters not within the principle and purview on which the statutes were originally framed and their words chosen. *Commonwealth* v. *Welosky*, 276 Mass. 398, 401, 402.[35] The authorities cited by the court do not in any way impugn this principle. The *De Lima* and *Puerto Rico* cases are [redacted] cases holding that a statutory reference to territories would be extended to cover a region that subsequently became a territory of the United States. The statement of Mr. Maxwell that an act dealing with a genus would be extended in its application to a later species of that genus cites cases such as the new kind of weapon case, but it in no sense affects the distinction stated in the *Welosky* and other cases and simply expresed in *State of Missouri* v. *Missouri Pacific Railway Co.*, 71 Mo. App. 385. The question there was whether a bicycle was baggage. The court said at page 393:

> "While the terms in question are flexible and may include the new uses, falling within the legitimate scope of their meaning, which arise in the growth of society,

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[35] "Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are part, and in the light of the Constitution and of the common law, to the end that they may be held to cover the subjects presumably within the vision of the legislature and, on the one hand, be not unduly constricted so as to exclude matters fairly within their scope, and, on the other hand, be not stretched by enlargement of signification to comprehend matters not within the principle and purview on which they were founded when originally framed and their words chosen. General expressions may be restrained by relevant circumstances showing a legislative intent that they be narrowed and used in a particular sense".

we are not warranted in giving them a new meaning so as to cover different subjects not within the principle upon which they are founded. To do this would be judicial legislation".

The indictment falls because as a matter of law, the exhibiting of the passports to the immigration inspectors in 1937 and 1938 was not a willful use of a passport within the meaning of Title IX. The motion for a direction on this ground (R. 226-7) should have been granted.

SECOND POINT

There was no evidence of willfulness or of any evil use or purpose.

There was no evidence that the presentation of the passport in 1937 and 1938 involved any evil use or purpose. The United States Attorney, lacking such evidence, attempted to establish bad faith by stressing prior episodes,—a method that served improperly to prejudice the jury. The court proceeding from a different, but equally erroneous angle, in effect ruled the question of willfulness out of the case by charging in substance that all that was necessary to show willfulness was an intentional use of the document.

1. In 1934 petitioner applied for a passport in his own name. In that application he made the representation "None" in response to the question concerning the "last" passport (R. 305). At the time the Richards passport was still outstanding[36]. Petitioner's application for renewal of his 1934 passport contained no misrepresentation. It truthfully set forth that petitioner was an American citizen. The representation "None" was not repeated. On the contrary, the "last"—the 1934—passport was presented for stamping. The renewal application contained no reference to the original application (R. 33). At the time of the renewal application and at the time of the "use" in 1937 and 1938 there were no unexpired passports outstanding.

Had petitioner in 1937 instead of applying for a renewal, asked for a new passport, his application would have stated nothing materially different from the renewal application.[37] The sole difference of substance would have

[36]The prosecuting attorney stated that the question in the application was designed, among other things, "to see to it that nobody has two passports of the United States in his possession * * *" (R. 274), and in two other places in his summation the prosecutor stresses the possession of more than one passport (R. 271, 277).

[37]Passport Application, form for native citizen, edition of 1937.

been that instead of presenting his "last" passport for *renewal* he would have presented it for *cancellation*. Had he received a new passport no one could have contended that the new passport had been obtained by a false statement. Petitioner moved for a direction on the ground that there was no false statement in the renewal application. This motion was denied by the court (R. 228-229) and the defendant excepted (R. 236). The motion should have been granted.

If there is a distinction between a new passport and a renewal passport it is on this slender reed that the case rests—there could not be an indictable use unless there was a passport obtained by a misrepresentation.

The use then for which petitioner was indicted, is the use of a paper to prove his citizenship,—a paper that contained no misstatement but that was procured by a collateral representation—once removed—which if false had nothing to do with his citizenship.

Of willful or dishonest use of the passport itself there was no evidence and because of the nature of the case there could not well have been any evidence. Such evidence as there was negates the idea of willfulness.

The evidence is that the passport was presented to the immigration inspectors. The best that any witness did in the way of positive recollection about the facts at the time of presentation was that Inspector German was "able to state" that Browder presented the passport (R. 27).

There was nothing covert in the presentation. Although the record does not disclose what happened at the time of petitioner's arrival in 1937, the immigration inspector German knew in 1938 that petitioner was coming "because of conversations with newspaper men on the trip down the bay" because "there were people down there to welcome him" (R. 128). The customs inspector knew too "there was quite a furore engendered by Mr. Browder's arrival. There was a number of press photographers there and a number of reporters" (R. 129). There is no evidence from which it may be inferred that petitioner believed or had

any reason to believe that there was anything wrong or could be anything wrong in a citizen presenting correct proof of his identity to the immigration inspectors.[38]

If petitioner could for a moment have thought that the mere presentation of the passport to establish a fact was for some technical or constructive reason criminal, why should he not have called one of the people on the dock to identify him. With so well known a figure identification would have been a matter of no difficulty. Miss Hayes, the clerk of the Passport Agency, when she initialed the passport knew who Mr. Browder was. "I know that he is a popular man and about his activity in life. As soon as I seen Mr. Browder I recognized it was Earl Browder from reading the papers about the party he was connected with" (R. 94). Where from these transactions is there any possibility of inferring the dishonest or evil intent that is the *sine qua non* of willfulness?

2. Petitioner did not deny that the "last" passport had been obtained under the name of Richards.[39] Petitioner's

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[38]In *People* v. *Clark*, 242 N. Y. 313, at p. 329, Lehman, J., writing for a unanimous court, reversed a conviction of a public officer indicted for receiving an emolument other than as authorized by law, saying that the crime was not committed "unless the money is received with wrongful intent. That intent is shown when it appears that the public officer has received something which he knows that the law does not permit him to accept". He refused to construe the statute so that the jury may convict "where in fact there has been no corrupt or criminal intent and no intention to injure others or to do the prohibited act and no understanding that the defendant was receiving more than he legally might".

[39]"We do not deny that in 1931 a passport was issued to him in the name of Albert Henry Richards. We do not deny that he used that passport. It is in evidence that he is an official of the Communist party, and it is in evidence here that he went abroad from time to time. Now, it is perfectly obvious, and I don't think we need any proof to show, that a member or an officer of the Communist Party in going abroad, going through those troubled countries in Eastern Europe, might very well meet difficulties if he was traveling under his own name. A man known to be the secretary of the Communist Party might have all sorts of difficulties put in his way, and that affords a very sensible reason for a man not wanting to travel under his own name" (R. 51).

This statement made by petitioner's trial counsel was quoted in full by the prosecutor in his summation (R. 267).

attorney attempted to limit the evidence to the last passport (R. 7-15, 133, 137, 151, 225-6, 230-1). The court ultimately ruled that it would be sufficient to establish falsity of the representation "None" if the prosecution proved that a single one of the non-Browder passports had been obtained by petitioner (R. 293). Nevertheless he refused to limit the evidence to the last passport (R. 15, 133, 137, 151, 226, 232). This refusal permitted the United States Attorney to parade before the jury *in extenso*, all the earlier episodes, some of which went back to 1921.

The prejudicial character of such evidence, its tendency to bring about convictions for offenses for which the defendant was not indicted, casts heavy responsibilities upon the prosecuting attorney.[40] How those responsibilities were borne can be fully appreciated only by a reading of the complete summation (R. 263-277). But the following references give some idea.

The prosecutor's summation occupies *14* pages of the record. On *11* of those pages he refers to the Dozenberg, Morris and Richards episodes.

The United States Attorney refers to petitioner's "bringing disgrace on his country for so selfishly and *fraudulently misusing* its credentials" (R. 268). He admonishes the jury, "Now I say to you that those are the questions you must decide; whether the committing of these acts and the *presentation of that bulk of false and fraudulent material* means anything in this country of ours" (R. 273). There was no evidence of any fraudulent use and no evidence of the presentation to the inspectors of any false and fraudulent material.

The fact that many friends met petitioner on his return in 1938 and that there could have been neither doubt as to his identification nor any suggestion of the covertness

[40]See *Berger* v. *U. S.*, 295 U. S. 78, 88; *Report to the National Commission on Law Observance and Enforcement* on "Unfairness in Prosecutions", p. 286.

or secrecy which accompany criminal acts, is thus treated by the United States Attorney:

> "I waited eagerly and impatiently to hear of the popping of flashlights from photographers' bulbs on the occasion when he came in as Nicholas Dozenberg and when he came in as Morris, and when he came in as Richards, but I waited, and you waited, and we all waited in vain for a single mention of the circumstances surrounding his arrival in our country on any of those occasions" (R. 273).

The language though colorful and prejudicial, is hardly relevant to the entry in 1938.

The prosecutor ended his summation on this note:

> "We can't leave the situation to some foreign official, on looking at an American passport and seeing the name Browder, to say, 'Now, are you really Browder or are you Dozenberg, Morris or Richards?' And for Browder to say, 'Oh, I made a mistake; I handed you the Browder passport. Just give it back; I will give you the Richards'" (R. 277).

The conclusion of the prosecution on this note was inexcusably unfair. The statement was utterly immaterial to the issues of the case and could have been justified only by the desire to focus the attention of the jury on the earlier episodes. The statement could have no bearing upon the 1937 and 1938 use of the renewal passport. There was only one passport then in existence. That passport correctly set forth the citizenship of the petitioner. That passport was not being used in foreign relations. The complete irrelevancy of the argument emphasizes the lengths to which the prosecuting attorney went to parade before the jury past episodes for which petitioner was

not on trial.[41] Analysis fails to disclose how any of those matters could have had any relation to the intent with which he presented his passport to the inspectors at the pier.[42]

The fact that petitioner was an official of the Communist Party was before the jury. The reading of the summation makes one inquire whether legal processes were not abused for political purposes; whether technicalities were not seized upon as an excuse for removing from society a man whose social tenets were unpopular?

3. The court charged: "The words 'willfully and knowingly' mean deliberately and with knowledge, and not something which is merely careless or negligent or inadvertent" (R. 292-293). He had theretofore denied a motion to dismiss the indictment on the ground that "the government's case is fatally defective in that it lacks the main essential ingredient of the entire case; namely, the criminal intent of the defendant at the time of the alleged act"; that there is "no proof that there was a knowing and willful use to gain entry" (R. 228).[43]

In effect the court charged the jury that they must convict. The court had charged that it was not necessary for

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[41]As was said in *State* v. *Willson*, 113 Ore. 450, 498, 230 Pac. 810, 39 A. L. R. 84, "the evidence of other offenses in this case only tend to blacken the character of the defendant. * * * No defendant ought to be deprived of his liberty by hue and cry or by the mob-mad yell of 'Crucify him' but only upon an indictment constitutionally framed and proven by evidence of criminal acts, a connection between which 'must have existed in the mind of the actor linking them together for some purpose he intended to accomplish'".

In *Boyd* v. *United States*, 142 U. S. 450, Harlan, J., stated that whatever may have been the character of the defendants, "however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged".

[42]The Solicitor General relied too on the prior episodes: He refers to the repeated applications for passports under an assumed name. The repeated falsifications as to the issuance of prior passports, he says, "constitute a course of conduct which preclude any *bona-fide* use of the passport obtained through the concealment of these offenses". (Government's Brief in Opposition to Certiorari, pp. 12-13.)

[43]The petitioner restated this ground for dismissal of the indictment in several different ways (R. 284, 285, 286-7).

the Government to show that "all three of these earlier passports (Dozenberg, Morris and Richards) were obtained by defendant in order to establish the falsity of the statement 'None' " (R. 293). He added that "satisfactory proof as to one of them would be sufficient for that purpose". The defendant did not dispute that a passport had been issued to him under the name of Richards (R. 51). The charge of the court taken in connection with the admission of the defendant established a passport secured by reason of a false statement. Since the court charged in effect that the passport was thus tainted and that any knowing use was a willful use, the conviction by the jury followed automatically.

4. As we have seen the court was in error as to its conception of "willfulness". *United States* v. *Murdock*, 290 U. S. 389 (and see *supra*, pp. 11-12).

Murdock had been indicted "for willfully failing to * * * supply * * * information demanded of a taxpayer". He "refused to disclose the name of the payee" of sums "deducted by" Murdock in making out his income tax return. The trial court in effect had charged the jury that the government had proved the defendant was guilty. This court affirmed a reversal of the conviction, holding (p. 394) that the conviction could not be supported since it proceeded upon the basis that the word "willful" used in the section upon which the indictment was found means no more than voluntary.[44]

5. The Circuit Court of Appeals held that "on the evidence it was for the jury to say whether the appellant's

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[44] The charges of the trial court in the two cases were surprisingly similar. "You will observe", the judge told the Murdock jury (Murdock rec. 48), "that the offense charged here is the willful failure or refusal to furnish information. That means, gentlemen of the jury, that having an opportunity to do so he *deliberately* designed not to furnish the information."

"The words 'willfully and knowingly' as employed in the statute", Judge Coxe instructed the Browder jury (R. 292-293), "mean *deliberately* and with knowledge and not something which is merely careless or negligent or inadvertent".

use of the passport was a wilful and knowing use". It expressed no opinion on the correctness of the charge of the trial court but thought that it could not be condemned for "not being more specific" (R. 403) when no exceptions raising the point were taken.

The court below erred in two respects: (1) There was no evidence for the jury and accordingly the motions to dismiss and for a direction (R. 226-9, 233-4, 235, 236) should have been granted. (2) Even had there been evidence to go to the jury the judgment should be reversed because the summation of the United States Attorney and the trial court's somewhat different misconceptions of the law undoubtedly caused a fundamental confusion in the minds of the jurors as to the specific charge for which the petitioner was then being tried. Absence of an exception may be disregarded here as under similar circumstances it was disregarded in the Murdock case.

For plain and fundamental error has resulted in petitioner's being convicted as a felon and given a heavy prison sentence. It must be corrected, where the conviction rests upon a wholly erroneous theory and upon evidence of acts which occurred years before and which if crimes have long been barred by the Statute of Limitations.

The judgment should be reversed and the indictment dismissed.

Respectfully submitted,

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[PUBLIC—No. 24—65TH CONGRESS.]

[Extract.]

[H. R. 291.]

AN ACT To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes.

TITLE IX

PASSPORTS

SECTION 1. Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. Clerks of United States courts, agents of the Department of State, or other Federal officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of $1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate.

Application requirements.

Fee limited.

Punishment for false statements in applications.

SEC. 2. Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years or both.

Using passports so obtained.

Illegally using passport of another.

Violating restrictions.

SEC. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

Delivery to unauthorized person.

Punishment for counterfeiting, forging, etc., passports.

SEC. 4. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made,

forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

Using forged, etc., passports.

Void passports.

Approved, June 15, 1917.

[22 U. S. C. §§213, 220-222. Title 22 of the U. S. C. is entitled: Foreign Relations and Intercourse.]